

2.026 [Repeal Standard 13]

Entrapment

The defendant has raised the affirmative defense of entrapment with respect to the charged offenses[s] of [_____]. The defendant must prove the following by clear and convincing evidence;

1. The idea of committing the offense[s] started with law enforcement officers or their agents rather than the defendant; *and*
2. The law enforcement officers or their agents urged and induced the defendant to commit the offense[s], and
3. The defendant was not predisposed to commit the type of offenses[s] charged before the law enforcement officers or their agents urged and induced the defendant to commit the offenses[s].

The defendant does not establish entrapment if [he] [she] was predisposed to commit the offenses[s]. It is not entrapment for law enforcement officers or their agents to use a ruse or to conceal their identity.

The conduct of law enforcement officers and their agents may be considered in determining if the defendant has proven entrapment.

If you find that the defendant has proven entrapment by clear and convincing evidence you must find the defendant not guilty of the offense[s].

SOURCE: A.R.S. § 13-206 (Statutory language as of July 21, 1997).

USE NOTE: Use language in brackets as applicable to the charges.

COMMENT: In 1997, the legislature codified the entrapment defense in A.R.S. § 13-206. See *State v. Preston*, 197 Ariz. 461, 4 P.3d 1004, 1006-07 (App. 2000). Consistent with prior case law, the statute requires that the defendant admit the substantial elements of the offense[s] as a condition of raising the entrapment defense. *Id.* 4 P.3d at 1007. However, the statute now requires the defendant to prove entrapment by clear and convincing evidence. *Id.*

Subsection D of the statute required that the trial court instruct the jurors that the defendant had admitted the elements of the offense[s] and “that the only issue for their consideration is whether the [defendant] has proven the affirmative defense of entrapment by clear and convincing evidence.” A.R.S. § 13-206(D). However, in *Preston*, the Arizona Court of Appeals declared subsection D of the statute unconstitutional because it effectively denied a criminal defendant the presumption of innocence and the right to a jury determination of guilt. 4 P.3d at 1009-11. The court held that subsection D was severable from the remainder of the statute. *Id.* at 1011. The court upheld placing upon the defendant the burden of proving the affirmative defense of entrapment by “clear and convincing evidence.” *Id.* at 1007-08.
